1984

Milne Truck Lines, Inc v. Public Service Commission of Utah, Brent H. Cameron, David R. Irvine, And James K. Byrne, Commissioners of The Public Service Commission of Utah, And P.B.I. Freight Service, Inc : Brief 0F Defendant P.B.I. Freight Service, Inc.

IN THE SUPREME COURT

OF THE STATE OF UTAH

MILNE TRUCK LINES, INC., Plaintiff, vs. PUBLIC SERVICE COMMISSION OF UTAH, BRENT H. CAMERON, DAVID R. IRVINE, and JAMES K. BYRNE, Commissioners of the Public Service Commission of Utah, and P.B.I. FREIGHT SERVICE, INC., Defendants.	:	Case No. 19237

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IN THE SUPREME COURT

OF THE STATE OF UTAH

MILNE TRUCK LINES, INC.,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	
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Defendants.	:	

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STATEMENT OF THE CASE

The plaintiff applied to the Public Service Commission of Utah (Commission) for a Certificate of Convenience and Necessity to operate as a common motor carrier of general commodities between points in Salt Lake and Utah Counties.

DISPOSITION BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

The Commission denied the application for a Certificate of Convenience and Necessity. The plaintiff applied for rehearing, this defendant replied and the Commission ultimately denied the petition.

RELIEF SOUGHT ON APPEAL

Defendant, P.B.I. Freight Service, Inc., (P.B.I. seeks to have the Report and Order of the Commission dated March 17, 1983, affirmed and the plaintiff seeks to have the same set aside.

STATEMENT OF FACTS

Plaintiff seeks authority from the Commission for the transportation of general commodities between points in Salt Lake and Utah Counties. Defendant P.B.I. is presently authorized by the Commission to perform such service and does so on a daily basis. In addition, P.B.I. provides common carrier service between Salt Lake County and points beyond Salt Lake County in Kane, Juab, Sanpete, Sevier, Millard, Piute, Wayne and Garfield Counties, Utah. Plaintiff seeks to duplicate the Salt Lake and Utah County operations of P.B.I. It is this route which generates a substantial portion of P.B.I.'s current revenues. The large volumes of traffic moving between points in Salt Lake and Utah Counties in effect "subsidizes" the P.B.I. operation to the outlying areas in Southern Utah (R. 398).

The volume of freight handled by P.B.I. between points in Salt Lake and Utah Counties has steadily declined in recent years (Ex. 34-37, R. 959-966). This has resulted in P.B.I. seeking annual rate increases from the Commission to cover its fixed costs (R. 428). During the pendency of this application, plaintiff was temporarily authorized by the

Commission to provide transportation services on the Salt Lake to Utah County route. That authorization resulted in a further decline of shipping volume to P.B.I. (R. 898), notwithstanding rate increases and cost-cutting efforts by the defendant. (R. 910-913) At the time of hearing in this matter, P.B.I. lacked the funds to meet its obligations in the amount of $80,000 (R. 898).

In addition to P.B.I., there are numerous specialized carriers serving the area sought to be served by Milne. Collectively the services of N.D.S. and Wycoff totally duplicate the prior service of Rio Grande in Utah County.

Utah Code Ann. §54-6-5 (1953 as amended) provides in part that unless the Commission finds from the evidence presented that public convenience and necessity requires the proposed service, it may deny the proposed application. Plaintiff produced twenty-one public witnesses in an attempt to demonstrate public convenience and necessity for the proposed operation. (R. 63-277). The Commission properly found that any complaints concerning the service of P.B.I. by these witnesses were minor, remote in time, and exaggerated. The Commission also noted that the complaints showed only the sporadic problems which must be expected with any carrier and that no problems amounted to a service deficiency. (R. 654).

Prior to September 28, 1982, Rio Grande Motorway held authority from the Commission and conducted operations pursuant to that authority transporting general commodities between

points in Salt Lake and Utah Counties. That carrier went out of business for financial reasons (R 652). In part, plaintiff claims to seek only to replace the prior service of Rio Grande. Because Rio Grande was forced out of business by financial problems, the Commission properly found that the available traffic moving between Salt Lake and Utah Counties in the recent past would not support two general commodity carriers (R. 652).

P.B.I. has sufficient equipment to provide all of the needed service between points in Utah and Salt Lake Counties both at the present or at an increased volume of traffic. (R. 913). It is doubtful, however, whether P.B.I. could continue to survive if Milne Truck Lines is granted its application. (R. 917). P.B.I. does not have the resources to compete with plaintiff and plaintiff's parent company, Sun Oil (R. 904). Plaintiff presently operates at a loss and yet has "unlimited" backing and funds from its parent which would allow it to continue to lose funds while driving P.B.I. out of business (R. 12 & 20). In light of the foregoing, the Commission properly concluded that even with the demise of Rio Grande Motorway, the volume of traffic available between Salt Lake and Utah Counties does not justify the addition of a new carrier and that the existing service of P.B.I. is adequate, requiring denial of the application (R. 650-659).

As plaintiff stated in its Brief, (page 3 & 4) P.B.I. called witnesses to rebut, through documentation, all of the

undocumented general allegations of problems offered by plaintiff. As plaintiff states in its brief, the "main thrust of P.B.I.'s evidence was that it was in dire financial difficulty and it might be unable to withstand the competition threatened by plaintiff, Milne." The result arises from the fact that there is not a sufficient level of commerce on the route to support two operators. The Division of Public Utilities is opposed to granting the application. (R. 656). The need for an additional carrier did and does not exist and the application of plaintiff was denied.

ARGUMENT

POINT I

THE COMMISSION'S REPORT AND ORDER IS IN ACCORDANCE WITH THE LAW.

The Commission properly concluded that it is incumbent upon an applicant to show, where the party seeks to duplicate an existing authority, either a deficiency in the existing service or potential market growth justifying new service (R. 656 & 657). This court has followed the "deficiency of existing service test" from the inception of the concept in Mulcahy v. Public Serv. Comm'n, 101 Utah 245, 117 P.2d 298 (1941), through the landmark case of Lake Shore Motor Coach Lines v. Bennett, 8 Utah 2d 293, 333 P.2d 1061 (1958) and Scott Moore, d/b/a Circle X Trucking v. Public Serv. Comm'n, No. 15827, unpublished opinion (April 10, 1978, per curiam). The gist of this legal doctrine was succinctly stated by the

court in Lake Shore Motor Coach Lines v. Bennett, Supra 1063.

> In any populous area it is easy enough to procure witnesses who will say that they would like to see more frequent and cheaper service. That alone does not prove that public convenience and necessity so require. Our understanding of the statute is that there should be a showing that existing services are in some measure inadequate, or that public need as to the potential of business is such that there is some reasonable basis in the evidence to believe that public convenience and necessity justify the additional proposed service.

The language of the applicable statute, Utah Code Ann. §54-6-5, imposes upon the Commission both requirements for granting a certificate and the standards for rejecting an application. The requirements for granting a certificate read as follows:

> Before granting a certificate to a motor carrier, the Commission shall take into consideration the financial ability of the applicant * * * the character of the highway over which the common motor carrier proposes to operate * * * and also the existing transportation facilities in the territory proposed to be served. (Emphasis added.)

The standard for rejecting an application is then stated in the statute as follows:

> If the Commission finds that the applicant is financially unable * * * or that the highway over which he proposes to operate is already sufficiently burdened with traffic, or that the granting of the certificate applied for will be detrimental to the best interests of the people of Utah, the Commission shall not grant such certificate.

The Commission found that there is not enough traffic involved in this proceeding to support two general commodity carriers, that P.B.I. can and does provide the service required, that the public witnesses demonstrated that the service of P.B.I. is adequate and/or that the minor complaints voiced amounted to less than a service deficiency and that the existing service of P.B.I. has been declining and must be protected by denying authority to an additional competitor. (Findings 4, 5, 6, 9, 10 & 11, R. 652-656). Each of these findings are in accordance with the statutory considerations required of the Commissions cited above.

The findings of the Commission are also in accord with Utah Code Ann. §54-6-4 (1953 as amended), wherein the Commission is required:

> To regulate the facilities, accounts, service and the safety of operations of each such common motor carrier, to regulate, operating and time schedules so as to meet the needs of any community, and so as to ensure adequate transportation service to the territory traversed by such common motor carriers, and so as to prevent unnecessary duplication of service between those common motor carriers * * * (Emphasis added.)

In deciding appeals from the Public Service Commission, this Court has, many times, expanded upon the statutory guidelines set forth above. In the case of Wycoff Co., Inc. v. Public Serv. Comm'n, 119 Utah 342, 227 P.2d 323 (1951), the Court stated:

> The Commission can take into account the record of the carriers then in the field, the amount of business available in the

> area and the number and type of carriers necessary to service the area adequately.

227 P.2d at 327.

It is that type of consideration that required the Commission to deny the application in the present case. In Wycoff, supra, the Court specifically affirmed the denial of an application for new authority because the proposed service area justified the operation of only one common carrier. The Court went on to hold:

> [The Commission's] conclusion that one common carrier can properly service an area and that another carrier competing for the same service in the same area would be detrimental to the best interests of the public cannot be held to be arbitrary by this court, if there is evidence which reasonably tends to establish that the volume of business permits only one profitable operation. Id.

The Commission had substantial evidence before it demonstrating that the volume of business permits only one profitable operation, and that no genuine inadequacy of service could be shown with regard to the existing carrier, P.B.I.

In light of the foregoing cases and statutes, it would have been error for the Commission to approve the application. Milne proved neither the inadequacy of existing service nor the potential business demand for additional common carrier capacity. To the contrary, P.B.I. demonstrated that the market demand was being satisfied. The Commission's findings were in accordance with the facts and required by the law as explained above.

Plaintiff relies on the case of Williams v. Public Service Comm'n, 29 Utah 2d 9, 504 P.2d 34 (1972), for the proposition that competition is a wholesome and stimulating factor and that it assures the public the best possible service. Plaintiff ignores the fact that in Williams, supra, this court also observed that "the primary reason for the granting of monopoly franchises is to avoid wasteful duplication of facilities such as in railroad and telephone services." 504 P.2d at 37.

Plaintiff also relies on the case of Harry L. Young & Sons, Inc., et al. v. Public Serv. Comm'n, et al., No. 18351 (Utah filed August 25, 1983), for the proposition that prior satisfaction with an applicant's service in other areas may support a grant of new authority to that applicant. However, the quote from that case on page 24 of Plaintiff's Brief leaves out two critical conditions that were taken into account in that case. Plaintiff omits from its quote that in Harry L. Young, supra, none of the existing carriers could provide the full extent of the needed services and that the supporting shipper in that case was not currently using the existing services. Harry L. Young, supra, at 27. This is totally different from the situation in the instant matter where the existing carrier (P.B.I.) does provide all of the service proposed by applicant and the supporting shippers do make use of the existing carrier, P.B.I.

The balance of the authorities cited by Plaintiff in its brief are from other jurisdictions and not applicable to this proceeding. Although plaintiff suggests otherwise, the law in Utah is clear as to the standards that must be met prior to issuance of a new Certificate of Convenience and Necessity to a motor carrier. These standards have been followed by the Commission in this proceeding and therefore the Commission's decision must be affirmed.

POINT II

THE COMMISSION'S REPORT AND ORDER IS SUPPORTED BY THE FACTS.

Plaintiff attempted to demonstrate public convenience and necessity for its proposed operation by presenting twenty-one public witnesses who testified in this proceeding. As the Commission properly found, the presentations made by these witnesses fell far short of a demonstration of public convenience and necessity and/or demonstrating any deficiency in the existing service of P.B.I. A brief summary of the public witness testimony follows:

1. Mr. Lewis of Lewis and Guyman testified that P.B.I. provides special tail-gate deliveries, diverts destinations, and provides early-morning delivery with flatbed equipment (R. 69 & 70). He testified that the P.B.I. service is satisfactory and all P.B.I. service was either same day or overnight between points in Salt Lake and Utah Counties during 1982. (R. 75).

2. Mr. Walz of Tharco Containers testified that he has five carriers available to him, that number is sufficient to meet his needs, and that he gets pretty good service out of all of them. (R. 83).

3. Mr. Dewey of Electrical Wholesale testified that he is presently getting satisfactory overnight service from P.B.I., Milne and N.D.S. on breakable items. (R. 94).

4. Mr. Stone of American Pad and Paper should not be considered in this proceeding as he is located beyond the territory of Salt Lake and Utah Counties.

5. Mr. Reeves of Pratt & Lambert Paint testified that the P.B.I. provides consistent and satisfactory overnight service. (R. 104 & 105).

6. Mr. Turner of Facet Filters testified that he has only used P.B.I. service once and on that occasion, it was a satisfactory overnight delivery in 1982. (R. 113).

7. Ms. Burgess of Lincoln Electric has not used P.B.I. in over three years (R. 119), and simply wants an additional carrier available. (R. 122).

8. Mr. Storrs of Anixter Mine & Industrial had an undocumented claim of missed pickups by P.B.I., all of which were rebutted with dispatch sheets. He is presently using P.B.I. with apparent success. (R. 129).

9. Mr. Louder of Bosco Fastening has no need for common carrier service as he uses his own truck to transport

his products between Salt Lake and Utah Counties. (R. 1
has done so for three years. (R. 156, 160, & 161).

10. Mr. Housekeeper of Universal Foods testifie
that he has never had any problems with P.B.I. (R. 173).

11. Mr. Diaz of Boise Cascade indicates only sele
use of P.B.I., but that the service has been good and overni
on at least seven documented occasions between Salt Lake and
Utah Counties. (R. 180-185).

12. Ms. Dansie of Nature's Herbs testified that sh
has had no problems using the service of P.B.I. within the la
year. (R. 192 & 193).

13. Mr. Hatch of Creed Laboratories indicates only
using P.B.I. on one occasion, receiving overnight service
from Salt Lake City to Provo. (R. 199). This witness is als
located beyond the territory sought by plaintiff.

14. Mr. Stout of Jones' Paint testified that P.B.I.
handled thirty-one shipments for his company between Februar
and July of 1982 and that in each case, the service was
adequate. (R. 211).

15. Mr. Anderson of W.W. Grainger testified as to
hearsay customer complaints concerning P.B.I.'s service. (R.
214). He also noted one occasion when his company mistakenly
shipped freight with P.B.I. that should have been delivered
a different destination. (R. 215).

16. Mr. Hatch of City Electric has no need for
common carrier service as he operates his own truck. (R. 22

for at least ten months he has had no need for any common carrier service. (R. 226). Prior to obtaining his truck, freight documents show twenty-five P.B.I. shipments between February and October of 1982 (R. 227), all of which show overnight deliveries with no damage between Salt Lake City and Provo. (R. 227-233).

17. Ms. Russell of Kitco, Inc., complained of a misplaced package transported by P.B.I. on one occasion, but her company suffered no monetary loss as a result. (R. 243).

18. Mr. Mastin of Stone Construction testified that he receives fairly good service from P.B.I. (R. 251).

19. Mr. Bills of Boise Cascade related hearsay information from American Fork Hospital concerning the hospital's complaints of slow P.B.I. transit time. (R. 259).

20. Mr. Hadley of Aspen Distribution indicated that his company makes shipments to Utah County but specified no carriers used or problems experienced. (R. 267 & 268).

21. Mr. Forsling of Hershey Foods indicated the present use of Milne and P.B.I. and an intention to continue using both. (R. 267 & 268).

Based on such a meager showing of public need and/or inadequacy of existing service, the Commission was required to properly conclude that applicant has failed in meeting its burden. Even a brief review of the foregoing summary of the twenty-one witnesses demonstrates that the Report and Order of the Commission has more than adequate support in fact. For

this court to rule otherwise would be to violate a well established rule of law.

> It is well-settled that this court cannot substitute its judgment for that of the Commission and its findings will not be disturbed when they are supported by competent evidence. Fuller-Toponce Truck Co. v. Public Service Commission, 99 Utah 28, 96 P.2d 722; Mulcahy v. Public Service Commission, 101 Utah 245, 117 P.2d 298; Uintah Freight Lines v. Public Service Commission, 119 Utah 491, 229 P.2d 675; and Rudy v. Public Service Commission, 1 Utah 2d 223, 265 P.2d 400.

Milne Truck Lines, Inc. v. Public Serv. Comm'n, 1[illegible] Utah 2d 365, 359 P.2d 909, 910 (1961). See also Uintah Freightways v. Public Serv. Comm'n, 15 Utah 2d 221, 390 P.2d 238, 240 (1964). Isolated instances of delay which the plaintiff is able to document are not sufficient to prove the inadequacy of present service. Mulcahy v. Public Serv. Comm'n, 101 Utah 245, 117 P.2d 298, 300 (1941).

The total failure of plaintiff to demonstrate the inadequacy of existing service and/or public convenience and necessity must be contrasted with the documented evidence presented by P.B.I. In every case where a public witness made even a vague, generalized, and in every case undocumented allegation of some minor service failure, P.B.I. searched its records and presented documented evidence showing an exemplary level of service. That response by P.B.I. was coupled with both the fact that a former carrier quit business for financial reasons and with the fact that the volume of business in the area has dropped drastically over the last few years. After

reviewing these facts, the Commission reached the undeniable conclusion that the public interest compels having one healthy carrier rather than two of questionable economic health. (R. 658). The conclusion of the Division of Public Utilities at the hearing was the same.

POINT III

THE COMMISSION'S REPORT AND ORDER IS RATIONAL AND REASONABLE.

The last matter raised in plaintiff's brief is that the decision of the Commission is beyond the limits of reasonableness or rationality. For this proposition, plaintiff relies upon the case of Utah Dep't. of Admin. Servs., v. Public Serv. Comm'n., 658 P.2d 601 (Utah 1983). As in its other citations of authority, plaintiff cites only a narrow and selected portion of the decision of this court in that case. Utah Dep't of Admin. Serv., supra, requires the Commission, inter alia, to follow the statutory standards which have been set for it by the legislature. The court noted that while no deference was given to the Commission's interpretation of law and extreme deference was extended to the Commission's findings on questions of basic facts, between these two extremes there existed an intermediate category of issues subject to judicial review to assure that the decision was reasonable. 658 P.2d at 608-10. The standards for this intermediate level review are the statutes regulating the activity. Id. at 611.

Sections 54-6-4 and 54-6-5 require the Commission to reasonably and rationally consider the existing services

available and to avoid unnecessary duplication of service in motor carrier operating rights cases. The Commission has done exactly that in this proceeding. Although Utah Dep't. of Admin. Servs. supra, explains and expands the responsibilities of administrative agencies, the discussion of the proper standard of review includes an excerpt from the Court's prior decision in P.B.I. Freight Serv. v. Public Serv. Comm'n, 598 P.2d 1352, 1354 (Utah 1979). The standard for review set down in P.B.I. supra, is re-quoted by this court in Utah Dep't of Admin. Servs., supra, at page 611 as follows:

> The Public Service Commission is charged with the duty of seeing that the public receives the most efficient and economical service possible. This requires consideration of all aspects of public interest * * *
>
> Considerations of policy are primarily the responsibility of the Commission. It is well settled that this court cannot substitute its judgment for that of the Commission * * * (Emphasis added).

658 P.2d at 611. The decision goes on to state that the court's substitution of its own preferences for the policy judgments of a Commission is forbidden, as long as the Commission's decision falls within the outer limits of reasonableness as measured by statutory policy.

In this proceeding, the Public Service Commission has before it all of the facts and history involved. The adversary parties presented to the Commission all of the facts necessary for the Commission to base its decision. Upon review of the history, the facts, the outlook for the future and the

applicable statutes, the Commission made its decision. The Report and Order issued in this matter, (R. 650-659), demonstrates that after hearing all of the evidence, the Commission considered the evidence with reasonableness and rationality, both of which are evident in the Findings and Conclusions of the Commission. (R. 650-659).

CONCLUSION

Plaintiff has been unable to show any deficiency in the existing transportation service of general commodities between points in Utah and Salt Lake Counties which would justify the granting of the authority applied for. Plaintiff's expectation that this court will review the evidence and supplant the Commission's judgment with its own would violate a long line of well-established doctrine, including the recent cases cited by plaintiff. Plaintiff cannot turn general undocumented evidence of minor service complaints into a showing of a general deficiency in existing service. The Commission would have committed reversible error had it granted the authority sought by plaintiff based upon such a minimal showing. Cf., Milne Truck Lines, Inc. v. Public Serv. Comm'n, 11 Utah 2d 365, 359 P2d 909 (1961). The findings of the Commission are supported by competent evidence and should not be disturbed.

The court should deny the plaintiff's requested relief, by affirming the Commission's ruling.

> Existing carriers that have expended risk capital, and have complied with tariff and other Commission requirements, ordinarily

are entitled to protection against competition until a proposed competitor or someone else establishes by substantial evidence, a failure to perform the service which the Commission has authorized and ordered them to perform.

Lake Shore Motor Coachlines, Inc. v. Bennett, 8 Utah 2d 293, 333 P.2d 1061, 1065 (1958) (Henriod J., concurring).

Respectfully submitted this 11 day of January, 1984.

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MAILING CERTIFICATE

I HEREBY CERTIFY that I mailed a true and correct copy of the foregoing BRIEF, by first-class mail, postage prepaid, this 11 day of January, 1984, to:

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